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Supreme Court, U.S.
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No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF OF *AMICUS CURIAE* THE DENVER POLICE PROTECTIVE ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether, in conflict with decision of the Sixth, Seventh, Eighth, and D.C. Circuits, the Tenth Circuit's decision permitting a *procedural* due process claim against a local government for its failure to protect the holder of a partial restraining order from private violence, so circumvents as to effectively repudiate this Court's holding in *DeShaney* rejecting a similar *substantive* due process claim?

2. If the Fourteenth Amendment's Due Process Clause is read to permit, via its procedural aspects, the same substantive claims already rejected by this Court in *DeShaney*, what kind of process is required for police inaction with respect to a partial restraining order *not* to violate the constitution?

PARTIES TO THE PROCEEDING

Petitioner: Town of Castle Rock, Colorado, a Colorado home rule municipal corporation.

Respondent: Jessica Gonzales, individually and as next friend of her deceased minor children Rebecca Gonzales, Katheryn Gonzales, and Leslie Gonzales.

Other Defendants Below: Aaron Ahlfinger, Robert S. Brink, and Marc Ruisi, current or former members of the Town of Castle Rock Police Department.

Amici Curiae Below: Colorado Municipal League; Colorado Counties, Inc.; and Colorado Association of Chiefs of Police.

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BRIEF OF *AMICUS CURIAE* THE DENVER POLICE PROTECTIVE ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Denver Police Protective Association ("DPPA") is an association representing police officers who are employed by the City and County of Denver, Colorado. The purpose of the DPPA is to improve wages, hours, terms and conditions of employment of Denver officers, aid in the

[1] The Denver Police Protective Association files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

improvement of the laws that govern the conduct and discipline of police officers, encourage police professionalism, and protect member-officers from injustice. In accord with those purposes, the DPPA offers its *amicus curiae* brief in support of the subject Petition for Writ of Certiorari upon the following bases.

In the instant action, the Tenth Circuit Court of Appeals extinguished qualified immunity for police officers as the result of their failure to offer a constitutionally sufficient procedure pursuant to C.R.S. § 18-6-803.5, when officers do not properly "hear" that spoken by a party who possesses a protective order, *Gonzales v. Town of Castle Rock*, 366 F.3d 1093, 1117 (10th Cir. 2004) (*en banc*). Previously such an action would have been prohibited by *DeShaney*. As the result, the DPPA predicts police officers will be unsure as to when to take a police action. Further, the DPPA believes that the judgment of the Court of Appeals will lead to an outbreak of litigation in the Tenth Circuit asserting claims of procedural due process based on other laws which mandate police enforcement.

Additionally, the judgment of the Tenth Circuit Court of Appeals will create great confusion for officers in the performance of their duties, and leave them little guidance in terms of deciding when a procedural due process right arises and what process is then due under the circumstances. Further, due to the inevitable shortage of resources and the status of officers as "first responders" in the war on terror, circumstances likely will arise in which the officer's response to procedural requirements will cause their attention to be diverted from other matters with potentially grave consequences. The Court of Appeals leaves officers no guidance on what to do in such situations and certainly suggests that they will face liability if they fail to offer the requisite process for any reason. The Court of Appeals' decision further will put officers in daily dilemmas as to what they ought to do in the case of when only one officer is

available to offer the necessary procedural due process to multiple persons to whom it is due.

In addition, the Tenth Circuit Court of Appeals' judgment creates an incentive for state and local governments to eliminate laws which may confer a property right so as to extinguish the potential that a litigant could prevail in arguing that no meaningful pre-deprivation hearing was held. Specifically, the City and County of Denver would have an incentive to re-write portions of the City Charter and Denver Police Department Operations Manual because each contain mandatory commands to officers that, under the analytical framework of the Court of Appeals' decision, would confer a property right to police protection or action. Such a result would have the collateral effect of destroying the written regulatory system that defines officer duties and conduct, and would lead to inconsistencies in enforcement and confusion due to poorly defined duties.

In short, if the Court declines to hear this case, officers will have difficulty on the streets deciding when to act and when not to act in order to avoid the possibility of liability. The DPPA is concerned that, to avoid litigation and liability over property rights, the City and State of Colorado will simply eliminate those laws which may create a procedural due process claim. The collateral effect would be to eliminate the specific duties of officers, creating even more confusion as to when an officer should take a police action and causing inconsistent enforcement of the law.

REASONS FOR GRANTING THE WRIT

I. The *En Banc* Opinion of the Court of Appeals Will Result in a Substantial Increase in Litigation Against Police Officers and Will Cause Officer Confusion on the Streets as to When to Take A Police Action.

A. The Court's Decision Eliminated Qualified Immunity for Officers Who Face the Mandatory

Command of C.R.S. § 18-6-803.5 and Other Similar Mandatory Statutes, Which Will Result in More Litigation Against Police Officers.

The Tenth Circuit affirmed the District Court's grant of dismissal of the case against Officers Ahlfinger, Brink, and Ruisi based on the affirmative defense of qualified immunity. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1117-18 (10th Cir. 2004) (*en banc*). The Court did so because it found insufficient precedent to conclude that the law was then clearly established, noting that only two district courts have "held that protective orders or their supporting statutes created a property interest in enforcement." *Id.* Certainly, the Court of Appeals' decision will result in future courts concluding that the procedural rights contained in C.R.S. § 18-6-803.5 and others are now clearly established, thus permitting future plaintiffs to assert these procedural due process claims against officers who fail to offer a process that leads to enforcement. Judge O'Brien in his dissent wrote:

> Qualified immunity has now been substantially eroded, if not eliminated, in all cases based upon mandatory and directive language contained in a statute. The law enforcement community is now on notice--"shall" means "shall"—and we shall brook no nonsense. Almost any such case, cleverly pled, will survive a motion to dismiss and quite possibly a motion for summary judgment. With the loss of immunity from liability goes the loss of immunity from suit. The rippling effects of what we have done here are obscured by the narrow focus—the need for a global approach to the issue of legislative purpose is evident.

Gonzales, 366 F.3d at 1138 (O'Brien, J., dissenting).

Thus, since officers are no longer immune from suit, potential plaintiffs now have an incentive to bring suit

against officers whenever damage arises from an officer's failure to take action in these instances. Plaintiffs will argue that proper procedure would have prevented the substantive injury. *Gonzales*, 366 F.3d at 1117 ("…the use of additional safeguards would have certainly aided in preventing the risk of wrongful deprivation."). As Judge McConnell noted in dissent, "[i]f the majority is correct, it will always be possible for plaintiffs to recharacterize their substantive due process claims against arbitrary action by executive officials as 'procedural due process' claims … . It will always be possible to say that, before they took the complained-of action, the executive officials should have engaged in some additional deliberative process, which might have averted the problem." *Gonzales*, 366 F.3d at 1129-30 (McConnell, J., dissenting). This cost to officers is but one of the "[e]normous economic consequences" that will flow from the majority's "reading of the fourteenth amendment." *Gonzales*, 366 F.3d at 1119, n.2 (Kelly, J., dissenting).

B. **Numerous State and Local Laws Presently in Existence Would Confer a Property Right to Mandatory Police Actions or Enforcement Under the Court of Appeals' Analysis**

The Court of Appeals decision "invites litigation in even more dubious cases" than the one at issue. *Gonzales*, 366 F.3d at 1093 (McConnell, J., dissenting). As Judge O'Brien noted in dissent, "[t]his decision will encourage others to scour state statutes and regulations in search of mandatory language on which to base their entitlements." *Gonzales*, 366 F.3d at 1141 (O'Brien, J., dissenting). Individual officers and their employers of course will be defendants in such litigation.

The framework the Court of Appeals used to determine a property right is amazingly simple given the volume of pages necessary to describe it. The Court of Appeals held that "the restraining order's *specific terms*, *mandatory language*, and

objective predicates limiting decision maker discretion, created a protected property interest in the enforcement of the domestic abuse protective order granted to Ms. Gonzales." *Gonzales*, 366 F.3d at 1116 (emphasis added). As to the *specific terms* of a statute or court order, the Court held that when a provision "mandates" a certain result and provides criteria which are by definition "objective predicates," *Id.* at 1104-05, a property right exists. The Court later states that, "[t]he word 'shall' is mandatory, not precatory, and its use in a simple declarative sentence brooks no contrary interpretation." *Id.* at 1109 (citation omitted). In dissent, Judge O'Brien reads the test simply as "'objective predicates,' which 'mandate the outcome' and 'limit discretion.'" *Id.* at 1137 (O'Brien, J., dissenting). The only guidance from the Court of Appeals on what constitutes an "objective predicate" is that the analysis turns on those duties which could be "reviewed under objectively ascertainable standards and judged by what a reasonably trained officer would know." *Id.* at 1105. This standard could be used to review most, if not all, of the statutory and regulatory commands describing the duties of police officers, and may potentially create "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Parratt v. Taylor*, 451 U.S. 527, 537 (1981) (citation omitted), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

The Court of Appeals held that the legislative history of C.R.S. § 18-6-803.5 indicated a specific intent to create a constitutionally-protected property right. The broad standard used by the Court, however, would result in a similar finding by courts in nearly every statutory and regulatory command governing police action that meets the test of specific language and objective predicates. The Court restated, with emphasis, the following language in the legislative history of C.R.S. § 18-6-803.5 as indicative of the clear legislative intent to create a property right: "*... the entire criminal*

justice system must act in a consistent manner, which does not now occur. ... the entire system must send the same message and enforce the same moral values ..." *Gonzales*, 366 F.3d at 1107 (emphasis supplied). The Court held that this language "emphasized the importance of the police's mandatory enforcement." *Id.* There was no mention of the word "property" nor were there any comments placed in the legislative record suggesting that this legislation took the extraordinary step of creating a constitutionally protected property right. One would suspicion that when a legislative body creates a property interest that previously did not exist, there would be some mention or consideration of the impact of conferring such a property right. There was not any mention of any of these concepts by the General Assembly in this instance. Likely instead the legislature relied on *DeShaney*.

This broad read of legislative purpose as a clear intent to confer a specific procedural right would permit findings that nearly all other statutes that provide officers a specific, non-discretionary order in particular circumstances confer a property right to an adequate pre-termination hearing. Frankly, the existence of all rules of conduct governing police officers are enacted for the benefit of members of a community so as to deliver consistency in enforcement of the laws, govern the conduct of police officers in specific situations, hold perpetrators of crime "accountable," and make victims or potential victims of crime "feel safe." *Gonzales*, 366 F.3d at 1107. A person protected by a regulatory or statutory command mandating officer action and containing the requisite objective predicate could prevail under procedural due process because all specific officer duties were created for the precise reasons the Court believed distinguished C.R.S. § 18-6-803.5 in this case. The Court of Appeals' decision will in effect permit a procedural due process claim to go forward when the officer "hears" a victim's complaint suggesting that an officer take a

mandatory police action but the officer fails to really "listen" to the substance of what the victim said. *Gonzales*, 366 F.3d at 1117 ("If one considers that constitutional process includes a right to be heard, Ms. Gonzales was deprived that process because, according to her allegations, the police never 'heard' nor seriously entertained her request to enforce and protect her interests in the restraining order.")

The end result of the Court's decision will be to confuse officers on the street as to when to act or when other duties or property rights in police protection can excuse inaction. Judge Kelly noted this problem in dissent by stating that the majority opinion "necessarily means that enforcement of this misdemeanor offense or this particular protective order prevails over any other law enforcement priorities and regardless of the circumstances." *Gonzales*, 366 F.3d at 1125 (Kelly, J., dissenting). Judge Kelly further suggested that the effect of the majority interpretation is to hold the property right of Ms. Gonzales "to the exclusion of protecting the public, other law enforcement priorities, and peace officers themselves." *Id.*

The Court further imposes the obligation on individual officers of giving a constitutionally adequate reason for the failure to take action. How officers are required to go about this is not defined with any particularity by the Court of Appeals. The Court only says that officers must make sure that they "engaged in bona fide consideration" and that the process offered is not a "sham" that renders a property interest a nullity. *Id.* at 1117. As Judge Kelly noted in dissent, it would be utterly impracticable to require law enforcement officers to conduct pre-deprivation hearings in the course of their other duties. *Gonzales*, 366 F.3d at 1126 (Kelly, J., dissenting).

There are numerous specific statutory and regulatory provisions that, when applying the Court of Appeals' "syllogism," can be asserted as creating a property right.

Gonzales, 366 F.3d at 1137 (O'Brien, J., dissenting). Each and every one of these noted provisions will be the subject of litigation under the Court of Appeals' holding in the District of Colorado, causing a burdensome increase in litigation expenses to officers and the potential of both personal and municipal liability.

1. State Statutory Law

By way of example, the following three sections of the Colorado Revised Statutes will, under the Court of Appeals' analysis, confer a property right to police protection. Certainly, these examples are not by any means an exclusive list of the potential statutory sections that may result in liability. The DPPA is particularly concerned, however, that the property rights conferred by virtue of the following three sections will result in litigation in every case where a property right is infringed because the officers fail to really listen to a witness, perfectly evaluate the situation, and take action based thereon.

C.R.S. § 19-3-316 concerns protection orders and emergency protection orders involving juveniles who are the victims of abuse. The mandatory language in the Statute is nearly identical to that contained in Section 18-6-803.5. In particular, Section 19-3-316(1)(d) states: "At any time that the law enforcement agency having jurisdiction to enforce an order issued pursuant to paragraph (a) of this subsection (1) has cause to believe that a violation of the order has occurred, it shall enforce the order." The General Assembly also provided that "The duties of peace officers enforcing orders issued pursuant to this section shall be in accordance with section 18-6-803.5, C.R.S., and any rules adopted by the Colorado supreme court ... ." C.R.S. § 19-3-316(3). Thus, this section contains the same enforcement provision and confers the same duties on officers as Section 18-6-803.5.

Legislative history supports the interpretation that C.R.S.

§ 19-3-316 confers a property right under the Court of Appeals analytical framework. First, there is an "emphasis" of the "importance of the police's mandatory enforcement." *Gonzales*, 366 F.3d at 1107. This emphasis is contained in C.R.S. § 19-3-302, which is the "legislative declaration" in enacting the Child Abuse and Neglect code: " ... it is the intent of the general assembly to protect the best interests of children of this state and to offer protective services *in order to prevent any further harm to a child suffering from abuse*" (emphasis added). The legislature here must have "clearly wanted" to protect children from harm. *Gonzales*, 366 F.3d at 1107. "Most significantly," according to the Court of Appeals in analyzing C.R.S. § 18-6-803.5, is the fact that the General Assembly limited the liability of officers, which supported the "goal" of the statutory scheme and the "conclusion" of the Court of Appeals. *Id.* Similarly, C.R.S. § 19-3-309 provides *complete immunity* from liability or adverse job consequences when any person is "performing his duties or acting pursuant to this part 3," and such conduct is not "willful, wanton, and malicious." Thus, the goal of vigilant enforcement supports the conclusion that the General Assembly intended to confer a property right. Finally, this Statute contains the precise objective predicates as C.R.S. § 18-6-803.5. Specifically, when an officer has "cause to believe that a violation of the order has occurred," the officer must "enforce the order." C.R.S. §§ 19-3-316(1)(d) & (2)(s).

A similar property right to police protection could be read into C.R.S. § 19-3-304, which requires peace officers to report child abuse. A peace officer, "who has reasonable cause to know or suspect that a child has been subjected to abuse or neglect" must report the same to law enforcement where the child resides. C.R.S. § 19-3-304(1). The same legislative history underlies this section as Section 19-3-316 above. This Statute contains an objective predicate: "reasonable cause to know or suspect child abuse." *Id.* The

language of the Statute is mandatory: "must report the same." *Id.* Thus, there is a property right in having abuse reported. If such abuse is not reported, an officer may be liable under the Court of Appeals' analysis for the consequences that flow from failing to provide a process that would have led to the filing of the report. In addition, the Court should note that this statutory section contains twenty-nine specific categories of other persons who are mandated to report when the objective predicates are met, widening the field of potential defendants beyond police officers to include nearly every state employee who may come in contact with a minor child. C.R.S. §§ 19-3-304(2)(a) – (cc).

A District of Colorado decision analyzing this section provides a fact pattern that would create a procedural due process claim under the Court of Appeals' analysis. Judge Nottingham of the District of Colorado properly, pursuant to *DeShaney*, rejected the claim that Section 19-3-304 conferred a substantive due process right. *Pierce v. Delta County Department of Social Services*, 119 F.Supp.2d 1139, 1149 (D.Colo. 2000). Under the facts of that case, the police investigators incorrectly "concluded that the allegations of child abuse were unfounded." *Id.* at 1143. The "crux" of Plaintiffs' claim was "that defendants' failure to comply with the [reporting] provisions of the Child Protection Act subjected the Pierce children to ongoing abuse at the hands of Gerard and/or Duran which culminated in Kayanna [Pierce]'s death." *Id.* at 1148. Under the facts of that case, Plaintiffs could now prevail under a claim premised on the Court of Appeals' holding in this case, arguing that the procedures offered by Delta County were in fact a "sham" because the County never properly engaged in "bona fide consideration" of the case at hand. *Gonzales*, 366 F.3d at 1117. It could be similarly be said that the officers and the County in fact never "heard" the complaints of child abuse made during the course of several police fact-finding investigations, which circumstances would have, after the

full facts of the case came out, objectively required enforcement action. *Id.* Judge Nottingham noted that the facts of the case were "tragic." *Pierce*, 199 F.Supp. at 1142. Thus, the equities were such that, if a cause of action could be maintained under procedural due process because the process offered was a sham, there was no bona fide consideration, and the officers failed to "hear" the victim, the process employed in that case could be said to similarly have "rendered her property interest ... not only a nullity, but a cruel deception." *Gonzales*, 366 F.3d at 1117.

Lastly, C.R.S. § 25-1-310 would confer a property right to police protection from oneself when drunk or from another drunken or intoxicated person. This section provides that an intoxicated person who the officer has "probable cause" to believe is intoxicated by alcohol and a danger to the health and safety of himself or others, "shall be taken into protective custody." C.R.S. § 25-1-310(1). The mandatory language is clear and similar to C.R.S. § 18-6-803.5. The standard is probable cause, which according to the Court of Appeals is an objective predicate. The legislative history makes clear that the General Assembly intended to remove the stigma of criminality attached to alcoholism and drug abuse, and thereby encourage officers to place intoxicated persons into protective custody rather than arrest them. C.R.S. § 25-1-301.

In short, the above sections of the Colorado Revised Statutes can be construed as conferring a property right under the Court of Appeals' framework, and thus will form the rule of law under which future claims likely will be brought against officers and others.

2. Municipal Charter and Regulation

Property rights could similarly be based on the Denver Municipal Charter and regulatory directives made pursuant thereto. The City Charter defines specifically how Denver Officers are required to devote their time to the discharge of

their duties to preserve order and to enforce the law throughout the City. Denver City Charter § 42-18.[2] Specifically, officers "*shall* arrest any person found under circumstances which would warrant a reasonable person in believing that such person had committed a crime." Denver City Charter § 42-19(a) (emphasis added). In addition, it is the duty of officers to apprehend any person charged with the commission of a crime. Denver City Charter § 42-20. Officers who do not follow these mandatory commands are subject to discipline up to and including termination. Denver City Charter §§ 42-27, 28 & 29. Each is similar in predicate and command to the instant case. Each contains the objective predicate of probable cause, and each commands police action ("shall arrest"). These provisions thus suggest that when an officer finds probable cause, he has no discretion in deciding whether to arrest. If the officer fails to arrest, and the suspect then commits additional crimes, officers could then be held liable for not providing an adequate process in the first instance.

In addition, Denver officers are by Charter subject to the rules and regulations as prescribed by the Chief of Police and Manager of the Department of Safety, *Id.* § 42-29, which rules are codified as the Denver Police Department Operations Manual (hereinafter "Manual").[3] The Manual contains numerous duties which could be understood under the Court of Appeals' framework to confer a property right to police protection. Certainly, the legislative history of the Manual would support that the purpose in enacting the regulations was to protect each and every member of the community from criminals, who when they are identified, must be brought into custody to prevent them from

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[2] A current version of the Denver Municipal Charter and Code is located at: http://www.denvergov.org/jump_municode.asp.

[3] The Denver Police Department Operations Manual is located at: http://www.denvergov.org/Police/template311677.asp.

committing further criminal acts against members of the community. The language in the introduction of the manual supports such a mandatory interpretation. *Manual* at ii ("Rules and Regulations must be adhered to at all times;" the Operations Manual "shall be the standard by which the actions of all officers in the Department of Police are to be measured").

Specific sections of municipal regulations that may confer protected property rights under the Court of Appeals' analysis are as follows:

a. Police Enforcement of Domestic Violence Laws.

Manual § 104.50 provides for a mandatory arrest when any act of "Domestic Violence," as defined by C.R.S. § 18-6-800.3 is committed. In addition, this section requires a mandatory arrest when there is probable cause to believe that violations of sections 18-9-111 ("stalking") and 18-6.5-102 ("primary caregivers" perpetrate the violence) have or are occurring. *Manual* § 104.50(2)(c). The objective predicate that must be met is merely that officers believe that there is probable cause that an illegal act of domestic violence has been or is being committed. *Manual* §§ 104.50(4) and (5). The legislative intent to require an arrest is clear in the sense that even if a victim seeks no arrest, an arrest is still required. *Manual* § 104.50(6)(a). The legislative history further supports the intent to create a mandatory arrest and thus property right because it was meant to correct the need for multiple interventions by police by requiring an arrest in the first instance, protect citizen safety, preserve police resources, and create a pro-active police response. *Manual* § 104.50(1).

b. Police Enforcement of All Restraining Orders

Further, the Operations Manual specifically enumerates when an arrest in a restraining or protective order violation is required. *Manual* at 100-64.1 - 100.68. The

Manual contains a flowchart with objective predicates for mandatory arrests in defined circumstances. In effect, this is the application of *Manual* § 104.50 to require enforcement of the panoply of protective order rules and statutes under certain circumstances, most particularly when the violation of the order can be defined as "Domestic Violence." The orders which Denver officers are commanded to enforce include those entered pursuant to the following statutory authority:

a. C.R.S. § 13-6-107 ("elder abuse");

b. C.R.S. § 14-4-101 ("domestic abuse");

c. C.R.S. § 14-4-103 (emergency protective order);

d. C.R.S. § 14-10-108 (divorce TRO);

e. C.R.S. § 14-10-107 (automatic domestic TRO);

f. C.R.S. § 18-1-1001 (protective order against criminal defendant);

g. C.R.S. § 19-2-403 (committed juvenile custody orders);

h. C.R.S. § 19-3-316 (dependency and neglect protective orders);

i. C.R.S. § 19-4-111 (temporary protective orders);

j. municipal no contact orders;

k. Colorado Rule of Civil Procedure 365 orders.

Manual at 100-65 – 100-68.

II. The Court of Appeals Decision Will Create an Incentive for State and Local Governments to Remove Statutory and Regulatory Commands that Confer a Property Right, and Such Revisions Will Destroy the System of Officer Discipline and Create

Chaos on the Streets

There are as noted in I., *infra*, numerous statutory and regulatory commands that could be read to confer a property right in police action or enforcement. To the extent that municipalities and states face liability by reason of these directives, they have an incentive to legislatively delete these provisions. "This decision ... yields a practical anomaly; states which actively promote police involvement in combating domestic violence by employing highly directive language, are subject to § 1983 litigation for their efforts, but states choosing a tepid approach are immune." *Gonzales*, 366 F.3d at 1141 (O'Brien, J., dissenting) (citation omitted). Thus, as Judge O'Brien writes, states will "adjust their statutes (not only family violence, but others as well) to avoid federal litigation and potential § 1983 liability." *Id.* The end result is that municipalities will offer officers more discretion to act under less clearly defined rules and procedures, thus destroying the equitable result the Court of Appeals must have hoped to achieve.

Further, these regulatory and statutory commands underpin the system of officer conduct and discipline. As noted, those specific rules provide for a system of officer discipline should officers transgress. If municipalities remove these rules because they believe they may confer a property right, and thus remove "those claims upon which people rely in their daily lives," *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), officers will have less guidance in terms of what to do in particular situations. Judge O'Brien noted in dissent that state alteration of statutory language to comply with the majority opinion in this case will have the collateral effect of "leaving statutes void of meaningful guidance and subject to uneven application." *Gonzales*, 366 F.2d at 1141 (O'Brien, J., dissenting).

CONCLUSION

As Judge O'Brien notes in dissent, "...*DeShaney* put to

rest the notion that simply because a state take steps to protect citizens from harm it thereby insures them against all ravages of modern life." *Gonzales*, 366 F.3d at 1132 (O'Brien, J., dissenting). Instead, the majority's decision revives claims that were put to rest by *DeShaney* and creates a font of "thinly disguised federal tort liability." *Id.* at 1133. In effect, substantive due process claims become actionable under the rubric of procedure.

The DPPA respectfully submits that the effect of the majority opinion is: (1) to confuse officers on the street as to when they should act and what procedures they should provide; (2) to create incentives for state and local governments to eliminate statutory and regulatory sections that could be read to confer a property right to police protection; and, (3) to cause more officer discretion and less uniformity in the enforcement of law.

For these reasons, the DPPA requests the Court to grant the petition and hear this case.

Respectfully submitted,

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